No. 83-484

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES SLEVIN, MARY SLEVIN, BRIAN CLINTON, JOAN CLINTON, DR. STANLEY C. FELL, and FRANK D'AMICO, on their own behalf and on behalf of all others similarly situated,

Petitioners,

– against –

CITY OF NEW YORK; NEW YORK CITY BOARD OF ETHICS; EDWARD I. KOCH, as Mayor of the City of New York; FRANCIS T.P. PLIMPTON, as Chairman of the Board of Ethics; POWELL PIERPOINT and BARBARA SCOTT PREISKEL as members of the Board of Ethics; and DAVID N. DINKINS as City Clerk,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF

This brief is submitted by petitioners in support of their petition for a writ of certiorari by way of reply to the brief of respondents in opposition to the petition.

Argument

(1)

Respondents describe the 1979 New York City Local Law 48 ("LL 48") privacy claim mechanism as so protective of legitimate privacy considerations as to foreclose any "issue concerning the right of privacy which is worthy of review by this Court." Respondents' Brief ("Resp. Br.") 27. The District Court found, however, that "that mechanism would itself be greatly destructive of privacy" (Petition ["Pet."] 37a) and that the mechanism "will not prevent,

and in some ways will exacerbate, invasions of legitimate expectations of privacy" (id. 91a). The District Court was correct. That Court's perception of the effect of the LL 48 privacy claim mechanism is supported by the Court's observations about the mechanism (id. 93a-97a): it does not prevent public disclosure of constitutionally cognizable privacy concerns; it causes unmeasurable delay in deciding a privacy claim which must await a request for access to the financial report; it requires still further disclosure and invasion of privacy in order to establish entitlement to a claim of privacy; and it invites public attention to the existence of matters of private concern just by the filing of the privacy claim required as a condition of non-disclosure.

It is clear that the statutory "considerations" (whether the item as to which privacy is claimed is "highly personal," "in any way relates to the [filer's] duties," "involves an actual or potential conflict in interest") taken into account by the Mayor-appointed public members of the Board of Ethics in passing on privacy claims (New York City Administrative Code §1106-5.0d, subd. 2) offer no substantial safeguard against undue invasion of privacy. On their face the statutory "considerations," stated neither in the disjunctive nor the conjunctive, either literally foreclose any successful privacy claim (any holding or money-related activity in some "way relates" to one of the various aspects of petitioners' duties and involves a "potential conflict in interest" [see Pet. 12a-13a]), or are so vague as

to be meaningless (what is "highly personal"?). By these non-standards there is no privacy claim which can reasonably expect to be granted, except as a matter of grace or generosity.

The record of the Board of Ethics cited by respondents does not support their view of the benign operation of the privacy mechanism.[1/] Three of the

1/The record of the Board of Ethics experience and practice cited by respondents and the Second Circuit is based upon affidavits, alleged principally on information and belief and without referencing the source (Court of Appeals Joint Appendix ["JA"] 713), submitted by respondents after the trial and the opinion of the District Court, without any opportunity for discovery, cross-examination or rebuttal by petitioners. Pet.16a. The use of such matter by respondents as part of the record on appeal was vigorously objected to by petitioners in the Court below. The Second Circuit did not sustain the objection, saying that the accuracy of the information involved was not contested but relied upon by petitioners. Pet. 16a. We must disagree with the Court of Appeals: petitioners specifically argued below, as a separate point in their brief, that the matter was not properly before the Court of Appeals; at another point in that brief incon-

nineteen privacy claims prosecuted to Board determination were denied; six other claims were withdrawn for unexplained reasons; one other claim "was otherwise disposed of;" and sixteen claims were upheld (some of these reflected multiple requests by a single filer). JA 716. Although respondents have not given the text of the claims allowed or denied, the District Court correctly concluded that "[a]ll three of the denied claims appear to have been based on privacy claims (such as the desire to avoid commercial solicitations) expressly recognized by the Court as constitutionally

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sistencies between the affidavits and respondents' responses to interrogatories were noted; and at another point the data was analyzed, as in the text here, to show they do not, in any event, sustain respondents' position. We reserve our objection to the continued use by respondents of evidentiary matter, central to their entire submission, as to which petitioners were denied their day in court.

significant, although unlikely to be deemed 'highly personal' under LL 48's privacy mechanism." Pet. 161a. The Board of Ethics has denied, as not "highly personal," privacy claims as to the address of a private residence purchased years before City employment (JA 717) or private assets relating solely to the filer's family (ibid). Plainly, the Board is no more a safeguard of privacy than the ill-defined "considerations" under which it operates. If, as we show, substantial privacy issues are evoked by LL 48 as here applied and as here amplified by the evidentiary trial record, nothing in the privacy claim mechanism, either facially or in operation, mutes or moots those issues.

(2)

The District Court found that "on the present record the public disclosure

aspect of the challenged law would interfere substantially with [petitioners'] privacy interests in autonomy and confidentiality." Pet. 37a. The Court of Appeals referred to the District Court findings, made "after a careful analysis," that the public disclosure aspects of LL 48 "substantially ... affects recognized autonomy interests" (Pet. 9a; see also id. 14a), never rejected those findings, and reached its decision on the apparent assumption that on the record here both the autonomy and confidentiality strands of privacy were involved, expressly declining "to decide the general applicability of the autonomy branch of privacy to financial disclosure laws" (id. 9a). Nonetheless respondents treat the autonomy interest as if it could never be implicated by a financial disclosure statute under any circumstances. Without a single reference to the record of auto-

nomy impairment in this case (see Pet. 8-11), respondents simply assert that financial disclosure laws do not implicate autonomy interests (Resp. Br. 23-24).

Respondents are clearly wrong in that the degree to which autonomy interests are evoked by the application of any statute, including a financial disclosure law, to a particular class of employees should be determined on the basis of the facts proved at trial. As the District Court stated:

> "The characterization-'financial privacy'- should not be permitted, by verbal trick, to relegate substantial autonomy claims to the constitutional status reserved for 'economic problems, business affairs, or social conditions.'...Financial privacy is not an 'economic' as opposed to a 'personal' right....[A] court must still decide in each case what significance to give those effects." (Pet. 62a-63a).

Respondents' view of LL 48's impact on constitutionally protected areas of free choice is not only wrong, but underscores

the need for review and clarification of those areas by this Court. For the differentiation in perception of the District Court, the Court of Appeals, and the parties in respect of the autonomy interest here confirms the uncertainty as to that vital matter we have already noted. Pet. 20-21, 24-26.

(3)

Both the Court of Appeals and the District Court said that they were employing an "intermediate" form of scrutiny, characterized by a "balancing" test, in deciding petitioners' challenge to LL 48, but applied in practice very different tests to determine the constitutionality of the law. Pet. 27-28.[2/] In this Court

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2/ It is also noteworthy that both courts below considered the so-called "intermediate," "balancing" test to be the same for the autonomy and the confidentiality branches of the right to privacy. But the former branch appears to call for stricter

respondents provide further confirmation of confusion on the standard of review where privacy rights are at risk. After noting that the "Court of Appeals ruled that §1106-5.0 must be analyzed under an intermediate standard of review or balancing approach" (Resp. Br. 29 n.4), respondents assert that their reading of Plyler v. Doe, 457 U.S. 202 (1982), "would suggest that a balancing of the interests is not required under the intermediate level of review" (ibid). Thus, although both courts below here regarded an "intermediate standard of review" and a "balancing approach" as the same thing, respondents contend that, under this Court's recent precedents, that is not the case.

Consistent with their stated under-

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scrutiny than the latter, particularly in so far as it requires that the means used are the least intrusive (Pet. 26), a standard not used by either court below and one clearly not met by LL 48 (see Pet. 13-15).

standing of the standard of review, respondents dispense with any discernible "balancing" of interests impacted by LL 48. Respondents make virtually no reference to the evidentiary record developed in the District Court. Respondents' brief does not discuss the privacy interests, if any, implicated by the compulsory disclosure of spousal information mandated by LL 48. See Pet. 9-10. Nor do respondents discuss the consequences LL 48 will have on the re-definition of intra-familial relationships. See Pet. 10-12. Respondents do not even discuss the significance of the over-and under-inclusiveness of the $30,000 salary figure by virtue of which petitioners are subject to LL 48, although respondents, in effect, concede the statute's over-inclusiveness in that, as they note (Resp. Br. 15 n.3), they have recently proposed legislation to exempt

employees earning between $30,000 and $42,000 from the statute's application.

The unsettled state of the law as to the proper standard of review to apply where laws intrude substantially upon cognizable privacy interests is reflected by the differences between the courts, as well as counsel, here on that score. Such an unsettled condition confirms the need for this Court to clarify that standard.

(4)

The District Court noted that:

> "[P]laintiffs in this case insisted, refreshingly, that the Court consider their particular claims, and not merely pass on the law as an abstract exercise. They produced comprehensive evidence of the law's purposes, its legislative background, its scope, its expected effects, and its potential utility." (Pet. 35a).

The District Court expressly found that the record established after the described trial and proof,"that the public disclos-

ure component of LL 48 serves no defensible purpose with respect to plaintiffs in this case." Pet. 37a. The District Court acknowledged that public disclosure may serve useful purposes in another case, but concluded that "these purposes lacked any evidentiary support or rational basis in this particular case. Plaintiffs are not elected, and they lack policymaking roles....The law's purpose as to these plaintiffs appears to be disclosure for disclosure's sake." Pet. 37a-38a. The Court of Appeals presumably rejected these findings, although never saying so explicitly and never setting them aside as "clearly erroneous" under Rule 52(a), Fed. R.Civ.P., and substituted findings of sufficient purposes sustaining LL 48 without referencing the record.[3/] Under-

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3/ The major purpose said by the Court of Appeals to be served by LL 48 was the deterrence of corruption and conflicts in interest. Pet. 12a-13a,

standably, respondents now argue that compelling public purposes cited by the Court of Appeals are served by LL 48 (Resp. Br. 28-33), although no proof to such effect was offered at the trial where the issue of proof of sufficiency of purpose was squarely posed (see Pet. 27-28) and although respondents cite to no portion of the record to support their claim.

The trial record shows that the respondents' speculation, not proof, of the purposes served by LL 48 may be the conventional but not the true wisdom. See note 3 supra. It is nonsense to believe

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fn3/ continued
18a-19a. The District Court found and the record confirms that respondents made no attempt at the trial to prove that LL 48 had that effect, and, in fact, respondents' witnesses conceded the law had no such result. Pet. 101a-103a. The Court of Appeals also speculated that public disclosure will enhance public confidence in City government. Pet. 18a. The respondents' expert testified he knew of no poll on the subject. JA 363-64.

that officials are likely to make a public disclosure of illegal holdings or income. See Pet. 12 n.8. And public confidence in government has declined, not increased since Watergate notwithstanding the post-Watergate flood of financial disclosure laws.4/

But it is not just the indicated error in the weight assigned by the Court of Appeals (and respondents) to the purposes served by LL 48 which warrants review. At least as needful of this Court's guidance is the difference between the courts below, as well as counsel, in respect of the data to be considered, in any "balancing" test, pertaining to the public interests being balanced. Here LL 48 was challenged as applied, not facially. The parties tried to the District

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4/ See Lipset & Schneider, "The Decline of Confidence in American Institutions," 98 Pol. Sci. Quart. 379, 381-87, 390 (Fall 1983).

Court, inter alia, the nature and the sufficiency of the purposes served by LL 48 as applied. The District Court rendered decision on the record thus made. The Court of Appeals ignored that record. This Court should settle which of these modalities applies upon a constitutional challenge to a statute as applied.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
November 23, 1983

Respectfully submitted,

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